

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

United States of America,

Plaintiff,

v.

Criminal Case No. 14-20652

James Michael Fizer,

Sean F. Cox
United States District Court Judge

Defendant.

/

OPINION & ORDER
DENYING DEFENDANT'S MOTION FOR COMPASSIONATE RELEASE

In this criminal action, Defendant James Michael Fizer (“Defendant”) was convicted of bank robbery. The matter is before the Court on Defendant’s Motion for Compassionate Release under 18 U.S.C. § 3582(c)(1)(A), which is based upon concerns about the ongoing novel coronavirus pandemic (“COVID-19”). This motion asks the Court to allow Defendant to serve the remainder of his sentence at home because he is concerned that he could contract the virus, and that he may be vulnerable to severe illness if he were to contract it. The Court concludes that a hearing is not warranted and orders that the motion will be decided based upon the briefs. As explained below, the Court shall DENY the motion.

BACKGROUND

In this criminal case, Defendant pleaded guilty to Bank Robbery, in violation of 18 U.S.C. § 2113(a). Defendant’s guidelines range was 151 to 188 months of imprisonment.

This Court sentenced Defendant to a term of 120 months of imprisonment. This Court imposed sentence upon Defendant on April 17, 2015. Before doing so, this Court carefully considered the applicable § 3553(a) factors as they relate to Defendant and discussed them on

the record.

Defendant is fifty-three years old and began serving his sentence on September 21, 2015. His projected release date is March 27, 2023. Defendant is currently housed at FCC Petersburg Medium. Defendant filed his Motion for Compassionate Release asserting that he is heightened risk of more serious illness, if he were to contract COVID-19, because he is HIV positive.

The Government concedes that Defendant has exhausted his administrative remedies but opposes the motion on the merits, arguing that a consideration of the § 3553(a) factors weighs against his release.

ANALYSIS

“The ‘compassionate release’ provision of 18 U.S.C. § 3582 allows district courts to reduce the sentences of incarcerated persons in ‘extraordinary and compelling’ circumstances. 18 U.S.C. § 3582(c)(1)(A).” *United States v. Michael Jones*, 980 F.3d 1098, 1100 (6th Cir. Nov. 20, 2020).

“The passage of the First Step Act in 2018 expanded access to compassionate release by allowing inmates to bring compassionate-release motions on their own behalf.” *United States v. Elias*, __ F.3d __, 2021 WL 50169 at *1 (Jan. 6, 2021).

“An imprisoned person may file a motion for compassionate release after (1) exhausting the BOP’s administrative process; or (2) thirty days after the warden received the compassionate release request – whichever is earlier.” *Jones, supra*, at 1106. Here, it is undisputed that Defendant has met the requirement to exhaust administrative remedies, and therefore, this Court may consider Defendant’s motion.

The United States Court of Appeals for the Sixth Circuit has held that sentence-

modification decisions pursuant to § 3582(c)(1)(A) embody a three-step inquiry:

Before granting a compassionate-release motion, a district court must engage in a “three-step inquiry:” the court must “find” that “extraordinary and compelling reasons warrant [a sentence] reduction,” ensure “that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission,” and “consider[] all relevant sentencing factors listed in 18 U.S.C. §3553(a).” *United States v. Jones*, 980 F.3d 1098, 1101 (6th Cir. 2020) (citing 18 U.S.C. §3582(c)(1)(A)). If each of those requirements are met, the district court “may reduce the term of imprisonment,” but need not do so. 18 U.S.C. §3582(c)(1)(A).

Elias, supra, at * 1.

At step one, a court must find whether “extraordinary and compelling reasons” warrant a sentence reduction. 18 U.S.C. § 3582(c)(1)(A)(I).

“At step two, a court must ‘find[]’ whether ‘such a reduction is consistent with *applicable* policy statements issued by the Sentencing Commission.’” *Jones, supra*, at 1108. (quoting 3582(c)(1)(A)) (emphasis added). But the Sixth Circuit has held “that § 1B1.13 is not an applicable policy statement for compassionate-release motions brought directly by inmates, and so district courts need not consider it when ruling on those motions.” *Elias, supra*, at *2. “And, in the absence of an applicable policy statement for inmate-filed compassionate-release motions, district courts have discretion to define ‘extraordinary and compelling’ on their own initiative.” *Id.* That means that, “[u]ntil the Sentencing Commission updates § 1B.13 to reflect the First Step Act, district courts have full discretion in the interim to determine whether an ‘extraordinary and compelling’ reason justifies compassionate release when an imprisoned person files a § 3582(c)(1)(A) motion.” *Jones, supra*, at 1109. Because Defendant’s compassionate release motion was filed by an incarcerated person, this Court “may skip step two of the § 3582(c)(1)(A) inquiry and ha[s] full discretion to define ‘extraordinary and compelling’

without consulting the policy statement in § 1B1.13.” *Jones, supra*.

“At step three, ‘§ 3582(c)[(1)(A)] instructs a court to consider any applicable § 3553(a) factors and determine whether, in its discretion, the reduction authorized by [steps one and two] is warranted in whole or in part under the particular circumstances of the case.’” *Jones, supra*, at 1109.

The Sixth Circuit has explained that, “in *granting* a compassionate-release motion, district courts must address all three steps.” *Elias, supra*, at *2 (emphasis added). But it has also clarified that “district courts may *deny* compassionate-release motions when any of the three prerequisites listed in § 3582(c)(1)(A) is lacking and do not need to address the others.” *Id.* (emphasis added).

Here, Defendant contends that his request for compassionate release should be granted because his medical condition, in light of the ongoing pandemic, constitutes an extraordinary and compelling circumstance.

This Court agrees with other courts that have concluded that the COVID-19 pandemic alone does not justify compassionate release. *See, e.g., United States v. Shah*, No. 16-20457, 2020 WL 1934930, at *2 (E.D. Mich. April 22, 2020) (“[S]peculation as to whether COVID-19 will spread through Defendant’s detention facility ..., whether Defendant will contract COVID-19, and whether he will develop serious complications, does not justify the extreme remedy of compassionate release.”); *see also United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020) (“[T]he mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release[.]”).

Defendant is a fifty-three year-old man who is HIV positive and is receiving ongoing

treatment for HIV. The Government has presented materials suggesting that HIV status is not one of the confirmed medical conditions for which people are at increased risk of severe illness from COVID-19.

Moreover, even if this Court were to find that extraordinary and compelling circumstances exist in Defendant's case, this Court concludes, as a matter of its discretion, that consideration of the § 3553(a) factors weighs against granting compassionate release in this case. *United States v. Ruffin*, 978 F.3d 1000, 1008 (6th Cir. Oct. 26, 2020) ("Even when extraordinary and compelling reasons exist, the statute leaves district courts with discretion to deny relief under a balancing of the sentencing factors in 18 U.S.C. § 3553(a).").

First, the nature and circumstances of Defendant's offense weigh against his release. Defendant pleaded guilty to bank robbery. During the commission of that offense, Defendant presented a note threatening the murder of bank employees if they did not quickly comply with his demands ("This is a stick up Don't [sic] make it a murder 50 and 100 [sic] got 5 seconds.") (ECF No. 15 at 2). Moreover, this was not an isolated event. Defendant has an extensive criminal history, qualifies as a career criminal, and is a four-time convicted bank robber.

The Court does acknowledge, as it did during his sentencing, that Defendant has a troubled childhood and has had issues with substance abuse and his mental health. But this Court already gave Defendant a considerable break when it gave him a below-the-guidelines sentence.

Releasing Defendant early would not reflect the seriousness of his offense, promote respect for the law, protect the public, or deter future conduct. This Court concludes that Defendant is not an appropriate candidate for the extraordinary remedy of compassionate

release.

CONCLUSION & ORDER

For the reasons set forth above, **IT IS ORDERED** that Defendant's Motion for Compassionate Release is **DENIED**.

IT IS SO ORDERED.

s/Sean F. Cox

Sean F. Cox

United States District Judge

Dated: January 14, 2021